Supreme Court, U. S.
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No. 79-2078

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1980

TIMOTHY V. SWARTOUT,

Petitioner,

v.

CIVIL SERVICE COMMISSION OF CITY OF SPOKANE, and COUNTY OF SPOKANE,

Respondents,

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

JAMES C. SLOANE
CORPORATION COUNSEL

CHRISTINE CARY
ASST. CORPORATION COUNSEL

602 City Hall
Spokane, Washington 99201
(509) 456-2657

ATTORNEYS FOR RESPONDENTS

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The Civil Service Commission of the City of Spokane, respondent, respectfully submits that the decision of the Court of Appeals, Division III of the State of Washington, entered the correct decision in this proceeding on January 15, 1980.

OPINION BELOW

See Petitioner's Brief.

JURISDICTION

See Petitioner's Brief.

CONSTITUTIONAL PROVISIONS, CHARTER PROVISIONS OF THE CITY OF SPOKANE, RULES AND REGULATIONS OF CIVIL SERVICE COMMISSION.

The provisions cited in petitioner Swartout's Petition for a Writ of Certiorari are improperly entitled City Ordinance. It is important to note that the provisions are from the Charter of the City of Spokane, and are not ordinances. The Charter provisions are otherwise set out verbatim.

QUESTIONS PRESENTED FOR REVIEW

1. Is the Civil Service Commission of the City of Spokane required to give all employees an appeal from a discharge even though there is no statutory provision for such a hearing?

2. Is the publication of a discharge of an employee a violation of his "liberty interest" even though the employer did not disseminate the information?

3. Is it necessary for the employee to refute the charges that were publicized in order to invoke the right to a name-clearing hearing? If there is no factual dispute, did the employee suffer a constitutional deprivation?

STATEMENT OF THE CASE

1. Nature of proceedings below:

Petitioner, Timothy Swartout, was employed by the City of Spokane, respondent, as a Police Officer. He was terminated from employment with the City after three

months.

He filed a letter requesting an appeal from his discharge with the Civil Service Commission. The Commission declined jurisdiction to hear the appeal of Swartout on the basis that he was a probationary employee of the City. Swartout has referred to City ordinances in his Statement of the Case. In fact, there were no ordinances involved, but rather City Charter provisions.

Swartout made an application for Writ of Review to the Superior Court for Spokane County. The finding of the Superior Court was that Swartout was terminated in a manner consistent with Federal and State Constitutions, the Charter of the City of Spokane, the rules of the Civil Service Commission, and that the decision of the Civil Service Commission in denying jurisdiction to hear the appeal was proper. The Court of Appeals, Division III,

affirmed the judgment of the Superior Court. A Petition for Review to the State Supreme Court was denied.

2. Statement of Facts:

Petitioner, Timothy V. Swartout, was employed by the City of Spokane as a Police Officer on October 30, 1977 (CP 44). Three months later, on January 27, 1978, he was discharged by the Police Chief for falsifying reports (CP 45). He filed a letter requesting an appeal from his discharge with the Civil Service Commission. The Commission declined jurisdiction to hear the appeal of Swartout on the basis that he was a probationary employee of the City of Spokane and because of this probationary status, not entitled to an appeal (CP 46).

At a prior time, Swartout had been a Police Officer for the City for a period of 4-1/2 years (CP 43). During that time he served a probationary period of one

year and then achieved permanent status as an employee of the City. However, he voluntarily resigned from that position, and from further employment with the City in July, 1976 (RP 23). At the time of his resignation, Swartout requested that his name be placed on an eligibility list (RP 23). His name was put on that list and approximately one year later he was informed that his name had advanced to the top of the list. He was told that he could be hired by the police department at that time (CP 44). Before being hired, he was required to have a physical examination and to take a polygraph examination (RP 53). These are customary tests for all original applicants to the Police Department (RP 53). Swartout questioned his status and was informed that he would be on probationary status (RP 26). He accepted the position and began working October 30, 1977. He was paid the same

amount as other probationary employees in the Police Department and he was not granted a uniform allowance, as are permanent employees (RP 27). Swartout was under no obligation to take the position as police officer (RP 49), but when he accepted the offer of employment it was not as a continuation of prior employment but rather as an original entrant, and thus as a probationary employee (RP 74). Swartout knew this at the time he accepted the position with the City (RP 14-15).

After a period of approximately three months of employment, Swartout was charged with filing false reports, and on January 29, 1978, was discharged.

The fact of his discharge was reported in the Spokane Chronicle on January 31, 1978, and was repeated in the Spokesman-Review on February 1, 1978 (CP 45). This was not the result of an intent by the City to release the information to the

media (RP 44). Rather, the press was able to gather the information from other sources and put together a story (RP 47). The Chief of Police was asked to make a statement and he initially declined to do so. The reporter then read the Chief the story that he was going to print (RP 38, 48), and a correction was made by the Chief in an attempt to protect Swartout by providing accuracy (RP 48). There was no other communication between the City and the media (RP 44). There was no malice towards Swartout, and no intent to deprive him of his rights (RP 44).

ARGUMENT FOR DENYING THE WRIT

1. PROPERTY INTEREST:

A property interest in employment is created and defined not by the Constitution, but by the rules which stem from state law. Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074 (1976). There is no due

process right to appeal for a public employee of the State of Washington, but rather ". . . only those rights and priviledges of public employees created by statute are protected by the due process clauses of the State and Federal Constitutions." Olsen v. University, 89 Wn.2d 558, 564 (1978) citing Yantsin v. Aberdeen, 64 Wn.2d 787, 345 P.2d 178 (1959). "There is no vested property right to public employment." Olsen v. University, supra at 564. The law applicable to Swartout is the Charter of the City of Spokane which created the applicable Civil Service rights. The Charter of the City of Spokane does not provide the right to appeal a discharge to a probationary employee. The property interest created by the Charter of the City of Spokane, Article VI, Section 53(f), is only for those employees who pass a one year probationary period. Swartout was afforded his rights under

Charter provisions and Civil Service Rules implementing those provisions; however, as a probationary employee, those statutory rights do not include the right to an appeal of a discharge from employment. The federal court should not become the forum which must review every personnel decision that is made by public employers. This would inevitably become the result of creating a federal common law of property rights which includes a right to public employment. The citizens of the City of Spokane may create that right by changing the City Charter.

2. LIBERTY INTEREST:

Swartout indicated that he was denied due process because of the publicity that accompanied his discharge from the Police Department. The right protected by the due process clause to which petitioner refers is the interest in liberty, that liberty being defined as a person's

interest in his good name, reputation, honesty or integrity. Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074 (1976). However, this Court refined the right to a hearing for loss of liberty to those instances when the public employer is "motivated" by a desire to curtail or to penalize the exercise of the employee's constitutionally protected rights. Bishop v. Wood, supra at 96 S.Ct. 2080.

There has been no claim by Swartout that the City publicized the discharge, or that there was any motivation or intent to deprive him of a constitutional right. In fact, the City was extremely careful to protect Swartout from false reports, and did not initiate any release of information pertaining to the discharge.

This Court has held in Codd v. Velger, 429 U.S. 624, 97 S.Ct. 882 (1977) that where a nontenured employee has been stigmatized in the process of terminating

his employment, he is entitled to a hearing, solely for the opportunity to clear his name.

> But if the hearing mandated by the Due Process Clause is to serve any useful purpose, there must be some factual dispute between an employer and a discharged employee which has some significant bearing on the employee's reputation. Codd v. Velger, 97 S.Ct. at 884.

Nowhere in the pleadings has Swartout asserted that the reason for his discharge was false. In his notice of appeal to the Civil Service Commission he stated "by this appeal I dispute the discharge and ask that the Commission rule that I am entitled to be reinstated." This statement is not a denial of falsifying reports. It is merely "disputing the discharge," not the actual charge itself.

The trial court recognized that at no time during the trial did Swartout contend that the allegations, which were the basis of his discharge in January, 1978,

were untrue or that he wished to refute them. The conclusion of the trial court was that Swartout was not entitled to an appeal before the Civil Service Commission by virtue of alleged violations of a "property interest" or "liberty interest" under the United States or Washington Constitutions. Since Swartout does not challenge the truth of the charges made, no hearing can possibly achieve the result of clearing his name.

> When we consider the nature of the interest sought to be protected, we believe the absence of any such allegation or finding is fatal to respondent's claim under the Due Process Clause that he should have been given a hearing. Codd v. Velger, 97 S.Ct. at 884.

Even in Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074 (1976), a hearing was required only if the employer disseminated a false impression about the employee.

In Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701 (1972), this court

stated that the liberty interest could be infringed if the government imposed a stigma that foreclosed the employee from other employment. It has not been shown by Swartout that he has been unable to obtain employment, or that the City attempted to deprive him from employment elsewhere.

Due process requires a hearing on the discharge of a public employee only if the employer creates and disseminates a false impression about the employee in connection with his termination. There was no identification made by Swartout of a false statement. He never refuted the charge of falsifying records.

CONCLUSION

The respondents, City of Spokane and Civil Service Commission of the City of Spokane, submit that the decision of the Court of Appeals, Division III, of the State of Washington is correct and

that Petitioner's request for Writ of Certiorari be denied.

Respectfully submitted,

JAMES C. SLOANE
Corporation Counsel

By:

Christine Cary
Assistant Corporation Counsel
602 City Hall
Spokane, Washington 99201

ATTORNEY FOR RESPONDENTS